

Protest of )  
MONARCH MARKING SYSTEMS ) Date: January 14, 1992  
Solicitation No. 104230-91-A-0103 ) P.S. Protest No. 91-49  
)

### DECISION

Monarch Marking Systems ("Monarch") timely protests award of a contract for 60,000 Postage Validation Imprinters ("PVIs")<sup>1/</sup> to MOS Scale International, Ltd. ("MOS") under Solicitation No. 104230-91-A-0103, issued April 12, 1991, by the Office of Procurement, Headquarters. Monarch claims that award to MOS was improper because its proposal was technically unacceptable, the proposals were improperly evaluated, and MOS is not a responsible offeror.

In October, 1986, the Postal Service competitively issued Solicitation 104230-87-B-0172 for engineering models of prototype PVIs. Solicitation -0172 contained a detailed technical specification describing the Postal Service's needs for the PVI.<sup>1/</sup> Several companies, including MOS and Monarch, were awarded contracts to develop the engineering models. The Postal Service determined that the PVIs of five companies, again including MOS and Monarch, had passed the tests set out in Solicitation -0172. After completion of the development contracts, the Postal Service made changes to the technical specifications and ultimately issued the instant solicitation.

In April, 1991, the requiring activity obtained from the Postal Service Board of Governors capital funding in the amount of \$34.7 million for the acquisition of 60,000

<sup>1/</sup> A PVI is a device designed to replace postage meters at retail windows. Operating through existing Integrated Retail Terminals ("IRTs"), it automatically dispenses and applies a self-adhesive postage validation label to a piece of flat mail or a parcel. The label contains traditional postage meter strip information, but also incorporates a destination bar code, allowing the mail piece to move directly into the automated mail processing stream.

<sup>2/</sup> As issued and awarded, Solicitation -0172 contemplated the evaluation of the engineering models followed by a field test. In July, 1990, the contracting officer informed the contractors that most of the testing of the engineering models had been completed, attaching the test results and stating that for purposes of the field test, all deficiencies would have to be corrected. Subsequently, the Postal Service changed its plans, canceling the field tests in an attempt to achieve an earlier deployment of the PVIs. On August 31, 1990, the development contractors were informed of this decision and that the Postal Service would rely on the results of the previous testing, theretesting of the PVIs after correction of deficiencies, and testing of a revised communications protocol, in determining the eligibility of the contractors to participate in the follow-on contract.

PVIs. As stated on its cover page, competition under Solicitation -0103 was restricted to the five named firms that had successfully met the technical requirements under Solicitation -0172. Section M.1, CONTRACT AWARD, stated that the Postal Service would "award a contract resulting from this solicitation to the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered." Section M.2 set forth the evaluation criteria as follows:

a. Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), Business/Management Proposal (if applicable), and other factors considered. The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below in descending order of importance:

All five (5) PVI models previously tested and to be delivered here are considered to be technically equivalent. Offers will be determined to be technically acceptable or unacceptable.

Since there are no evaluation variables other than price, only price will be used to select the contractor.

The contracting officer issued several amendments to this solicitation, two of which made minor changes to the technical specifications. Amendment A02 responded to written questions submitted by the various offerors. Several questions concerned the evaluation procedures. One offeror asked what "other factors" might be considered during the evaluation. The contracting officer responded that an unreasonably low price would be an example of "other factors." Another offeror asked what criteria would be used to determine whether an offer was technically acceptable. The contracting officer replied that "[a]n acceptable Technical Proposal clearly describes and defines the contractor's capability to meet the requirements of [the technical specifications]." Another offeror asked the contracting officer to clarify the portion of the solicitation that stated that only price would be used to select the contractor. The contracting officer reiterated that "[p]rice is the only factor used in selecting a contractor providing the proposal is technically acceptable and there are no other factors to be considered."

Several of the solicitation's technical specifications are pertinent to the protest. Section 3.10, Electrical Requirements, Loss of Phase, required that the PVI perform properly during a three cycle drop in power at 60 Hz. Section 3.3.1.4, Dimensions, required the PVI not to exceed 10 inches in width, 9 1/2 inches in height, and 17 inches in depth. Section 3.5, Labels, set forth the dimensions of the labels as not to exceed 3.0 inches by 1.38 inches and stated that "[t]he label carrier material shall be wound on a 3-inch, or smaller, diameter core, 4 inches or less in width, and shall hold at least 1,000 labels." Figure 5 of Section 3.4, Label Data, provided two options for the label to feed through the device.<sup>1/</sup> Section 3.5.2, Label Stock Specification, required the contractor

<sup>3/</sup> All the offered PVIs utilized thermal printers. Under option 1, serial mode, labels feed into and out of

to provide a specification for the label stock, including requirements for such things as paper type, adhesive, and shelf life, to be written in accordance with the technical specifications. Section 3.11, Environmental Characteristics, required the PVI to operate within various temperature and humidity ranges. The specification also required the labels to meet certain conditions with respect to print reflectance -- the measurement of reflectance of the bars and spaces of the bar code. Finally, Appendix D, Hardware Maintenance Requirements, section 5.1.1, stated that Postal Service employees would normally perform the operator servicing activities required to keep the PVI operational, such as replacing label stock. The offerors were to specify all such recommended activities. In this context, the specification stated that "NO task shall require the use of hand tools." (Emphasis in original.) The specification did not define hand tools.

All five eligible offerors submitted proposals. Written discussions were held with each to determine technical acceptability. On June 28, the evaluation committee informed the contracting officer that evaluations of the technical and management proposals were complete and that all proposals were acceptable. Best and final offers ("BAFOs") were solicited for submission on July 1. MOS was the apparent low offeror, at \$219.95 per unit. Monarch's offer was second low, at \$419.00 per unit. On July 2, a pre-award survey was performed on MOS. On July 8, the contracting officer asked MOS to verify that it had not made a mistake in its price, noting that there was a significant difference between MOS' price, the Postal Service estimate, and the other prices offered. On July 12, MOS responded, stating that it had not identified any errors and its proposal should be considered "as is." The contracting officer awarded the contract to MOS on July 19. On July 23, Monarch attended a debriefing on the award.

On August 2, Monarch filed its protest on the following grounds: 1) MOS' equipment will not perform according to the material technical specifications of the solicitation; 2) the contracting officer failed to make a determination of MOS' technical acceptability; 3) proposal evaluations were faulty because the contracting officer failed to consider any factors other than price and improperly conducted discussions after BAFOs with the successful offeror; 4) the contracting officer accepted a PVI that had not been prequalified; and 5) the contracting officer's determination that MOS is a responsible offeror is unreasonable because MOS lacks the financial capability and know-how to perform and is not a manufacturer or regular dealer as required by the Walsh-Healey Act. We set forth below the various submissions on an issue-by-issue basis.

### Technical Specifications

Monarch contends that MOS' offered unit will not meet the solicitation's specifications. First, Monarch alleges that the MOS unit's<sup>4/</sup> power supply is incapable of sustaining

the PVI short side first and the printer prints consecutively with the heater strobing on and off. Under option 2, parallel mode, the label feeds into the PVI long side first and the printer prints continuously with the heater staying on. Between the development contracts and this solicitation, the size of the label was enlarged to accommodate a new requirement for inclusion of the nine digit ZIP Code. Most, if not all, of the prototypes utilized a 2" print head which could accommodate the label in either the serial or the parallel mode under the old specifications. The change requires any offeror proposing a unit that prints in the parallel mode to use a print head large enough to accommodate the 3" label length.

<sup>4/</sup> Monarch assumes that MOS' offered unit is the same as its commercial thermal printer, which it claims

performance during a three cycle drop in power, as required by ' 3.10 of the specifications. According to Monarch, such a failure would cause poor quality bar code images, and incomplete printing of the label.

Next, Monarch claims that the MOS equipment cannot comply with the label printing format requirements.<sup>1/</sup> Monarch alleges that MOS' offered device has a 2" print head, but the printer "may lack the capability of printing . . . in the serial mode." Monarch also contends that rolls of 1000 three-inch long labels will not fit into the MOS unit without either a change in the unit's outside dimensions or a reduction in the size of the label core. The former, it claims, would exceed the PVI maximum dimension specification, while the latter will cause the labels to tend to curl, causing the device to jam or otherwise malfunction.

Monarch also alleges that MOS's proposed label stock will not be of sufficient quality to meet the specifications' requirements for shelf life and print reflectance. It reaches this conclusion based on MOS' prices for label stock. Finally, Monarch contends that the MOS equipment violates the maintenance specifications. Monarch alleges that the MOS unit will require the use of a brush or vacuum to keep it free from dust, contending that either item would be an impermissible "hand tool." In the absence of such maintenance, it contends that each unit will have to be mailed back to MOS three times a year for cleaning, at great expense.<sup>1/</sup>

Responding to the protest, the contracting officer states that the PVI proposed by MOS is not the same as its prototype. He states that MOS' technical proposal indicates that MOS' unit will comply with all the technical specifications, including the three cycle dropout requirement; printing in the serial mode under option 1; the maximum physical dimensions; accommodation of rolls of at least 1000 labels;<sup>4/</sup> and compliance with requirements for label stock.<sup>1/</sup> In addition, the contracting officer notes that all of these requirements will be verified at the first article test. Finally, the contracting officer states that MOS limited operating services to the cleaning of the print head, sensors, and outside enclosure, proposing the use of an alcohol swab for the print head and a

cannot meet the specifications. Monarch bases this assumption on the fact that, after completion of the development contracts, in returning all prototypes to the various vendors, the Postal Service inadvertently mailed the MOS unit to Monarch. Monarch asserts that it returned the unit to the Postal Service on the day it was received, and while repackaging it, observed that the prototype unit appeared to be identical to MOS' commercial printer. Monarch contends that at its debriefing, it learned that MOS offered, in this procurement, the same unit that had been tested under its development contract and, thus, infers that the proposed unit is also identical to MOS' commercial unit.

<sup>5/</sup> Monarch asserts that since the label specification was changed after the development contracts were completed, the Postal Service has not determined by testing whether any of the vendors' PVIs could meet the new label requirements.

<sup>6/</sup> Monarch's equipment, on the other hand, requires only the use of a cotton swab for cleaning. Monarch maintains that the cotton swab is not a hand tool.

<sup>7/</sup> The proposed MOS unit is said to be 8 3/4 inches wide, 7 inches high, and 17 inches deep, requiring no modifications to accommodate the required label roll.

<sup>8/</sup> MOS' proposed label stock is the same label stock it previously provided for testing.

soft brush for the sensors. The Postal Service considers neither the swab nor the brush to be "hand tools."

MOS submitted comments to the protest and to the contracting officer's statement. MOS asserts that it did not propose its commercial thermal printer in response to this solicitation, instead offering a PVI specially designed to meet the requirements of the Postal Service. MOS points out that many of Monarch's allegations with respect to MOS' ability to meet the technical specifications are based only on assumptions, not facts.

Commenting on the contracting officer's statement, Monarch contends that his statement that first article testing will verify whether MOS' unit will meet the three cycle dropout requirement or the label stock requirement is an insufficient response to its allegations. It observed the Postal Service's testing of its own unit and is aware that the Postal Service tested both three cycle dropout and label performance requirements.<sup>9/</sup> It states that it does not know whether the Postal Service tested the MOS unit for these characteristics, but if tested, Monarch believes that the MOS unit must have failed. Even assuming that the MOS unit passed the tests, Monarch contends that the Postal Service has no guarantee that the currently offered unit will meet the technical requirements, because MOS' proposed unit is not the same as its prototype.<sup>10/</sup>

Monarch submitted further comments following its protest conference. It contends that at its debriefing, a Postal Service representative stated that MOS' prototype PVI was equivalent to its commercial printer. Monarch asserts that its own tests and those of an independent laboratory have verified that the MOS commercial unit cannot pass the three cycle dropout test.<sup>11/</sup> It reiterates that the contracting officer has failed to state unequivocally that the MOS prototype unit passed the three cycle dropout test and concludes that the Postal Service never tested the MOS unit for this feature.

MOS was afforded a protest conference and subsequently submitted comments which contend the MOS unit inadvertently sent to Monarch was its engineering model, not its commercial printer. MOS submits that Monarch's assumptions about the technical capabilities of MOS' unit are faulty because they are based on the technical capabilities of MOS' commercial unit, not the unit supplied under the development contract or to be supplied under this solicitation. MOS asserts that the Postal Service did not request it to make any corrections relating to the three cycle dropout requirement. In any event, MOS maintains that whether its unit meets the technical requirements is a contract administration question and not a basis for protest.<sup>12/</sup>

<sup>9/</sup> During the course of the development contracts, the vendors were only permitted to observe the tests conducted on their own units.

<sup>10/</sup> In rebuttal, the contracting officer states that all five vendors' prototypes were tested to the same procedures and that the MOS unit passed all tests to which it was subjected.

<sup>11/</sup> An affidavit of Mr. Richard J. Kee, D.E., P.E., an assistant professor of engineering at the University of Dayton, attests that, using tests similar to, but less stringent than, those described in the Postal Service's specifications, the MOS commercial printer failed the three cycle dropout test.

<sup>12/</sup> In final comments, the contracting officer states that in post-award preliminary testing conducted in October, 1991, the MOS PVI passed the three cycle dropout test. Monarch contends that this

### Technical Acceptability

Monarch alleges that although the solicitation states that all five models previously tested were considered technically equivalent, it was still necessary for the contracting officer to determine whether each offer was technically acceptable. Monarch contends that the contracting officer's apparent failure to recognize that the MOS PVI does not meet all technical specifications is evidence that no technical acceptability determination was made.<sup>13/</sup> Furthermore, Monarch alleges that even if the contracting officer did make such a determination, there was no rational basis for the conclusion that MOS' offer was technically acceptable.

The contracting officer asserts that he did make a technical acceptability determination. A technical evaluation committee evaluated each technical and business/management proposal, finding all offers technically acceptable. The contracting officer maintains that he relied on the committee's review process and recommendations to determine that the proposed equipment would meet all technical specifications.<sup>14/</sup>

### Evaluation of Proposals

Monarch alleges that the Postal Service failed properly to apply the solicitation's evaluation factors to MOS' proposal. Citing POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985, Monarch asserts that the contracting officer is required to adhere to those criteria set forth in the solicitation, or otherwise inform all offerors of any changes in the criteria. Monarch contends that the contracting officer was obligated to consider factors "other than price" and failed to do so. Monarch points to MOS' "unreasonably low price" as such a factor, noting the discussion to that effect in Amendment A02.

Monarch alleges that the contracting officer did not perform an adequate price analysis as the Procurement Manual ("PM") required. It points to the differences between MOS' offered price of \$219.00 per unit, Monarch's offered price of \$419.00 and the Postal Service estimate of \$578.00, contending that MOS' price is unreasonably low on its face and must be substantially lower than its production costs and its dealer prices for its commercial units. Monarch alleges that, given these disparities, the contracting officer should have conducted further analysis. It concludes, however, that even if the contracting officer performed adequate price analysis, his acceptance of MOS' price proposal was unreasonable.

information is irrelevant and should be stricken from the record, or, alternatively, that the October testing is an admission that MOS' prototype PVI was never tested for that feature. We agree with Monarch that the post-award testing is not relevant to the issue of the propriety of the evaluation of MOS' proposal.

<sup>13/</sup> Monarch cites Handling Systems, Inc., P.S. Protest No. 89-70, December 19, 1989 for the proposition that a lack of documented evidence of a technical evaluation indicated that proposals were not evaluated according to the evaluation criteria.

<sup>14/</sup> MOS alleges that Monarch has not met the standard for overturning a technical evaluation, as it has not shown that the evaluation was arbitrary, in violation of procurement regulations, or unreasonable, citing York International Corporation, P.S. Protest No. 89-77, January 19, 1990.

Monarch also complains that the contracting officer improperly held discussions solely with the awardee. Monarch cites two PM provisions in support of its position. PM 4.1.5 g.(1) states, in part, that "[i]f discussions are held with one offeror, discussions must be held with all offerors in the competitive range." PM 4.1.5 f.(2) states in pertinent part:

Whenever there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal, award may not be made without discussions, unless the uncertainty can be resolved by clarification.

Monarch contends that the contracting officer's request for verification of MOS' price constituted discussions, as Monarch understood from its debriefing that the request stemmed from a suspected mistake in MOS' entire pricing structure. Monarch alleges that where verification is essential to determine the acceptability of proposals, the verification constitutes a discussion.<sup>15/</sup> Monarch asserts that the other offerors were prejudiced by being denied the opportunity to revise their proposals after BAFOs.

The contracting officer states that award was proper and in accordance with the stated evaluation factors. He states that he determined MOS' price to be both fair and reasonable.<sup>17/</sup> He notes that the PVI had never been purchased in production quantities before and, consequently, lacked prior pricing history.<sup>17/</sup> As a result, in making the determination of price reasonableness, he used price analysis and price competition in accordance with PM 5.3.3 b. and 5.3.3 c., respectively. The contracting officer states that he did suspect the possibility of a mistake due to "significant differences" between MOS' price, the Postal Service estimate, and Monarch's proposed price. Therefore, prior to award, as PM 4.1.3 f. required, he asked MOS to verify its price. The contracting officer disagrees that its request for verification of MOS' price constituted discussions, stating that he properly followed the procedures in PM 4.1.5 f.5. to resolve

<sup>15/</sup> Monarch cites ABT Associates, Inc., Comp. Gen. Dec. B-196365, 80-1 CPD & 362, May 27, 1980, where the contracting officer had engaged in improper discussions with one offeror:

[I]t is our view that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal . . . or when the information requested and provided is essential for determining the acceptability of proposals . . . . [citations omitted.]

<sup>16/</sup> The contracting officer's memorandum to the file, dated July 16, states that on the basis of his price analysis, "the time required for additional cost or price analysis by the Contract Pricing Division would not add significant value to the procurement process and could delay award unnecessarily." Accordingly, pursuant to an administrative instruction, he requested an exemption from the Acting Director, Office of Procurement, for further cost or price analysis by the Contract Pricing Division. The exemption was granted on or about July 16.

<sup>17/</sup> The contracting officer notes that the funds requested from the Board of Governors reflected the Postal Service's \$578 estimated unit price. He explains that, based on the lack of historical data, the funding request was set to decrease the likelihood of having to return to the Board for further funding. He states that, due to the lack of prior pricing history, there was no way to measure the estimate's accuracy and no way to anticipate how the estimate would compare to the pricing proposals. He does not explain why, under these circumstances, he used the estimate as one of the bases for requesting a price verification from MOS.

a suspected mistake.<sup>1/</sup>

MOS comments that the solicitation clearly states that "only price will be used to select the contractor," thereby refuting Monarch's allegations that the contracting officer failed to properly apply the evaluation criteria. MOS asserts that Monarch has failed to meet its obligation to show that the price reasonableness determination was clearly unreasonable, fraudulent, or made in bad faith.<sup>1/</sup>

MOS contends that even if Monarch is correct in assuming that MOS' proposal is priced below cost, that is not a basis for overturning the award.<sup>1/</sup> In any event, MOS asserts that it is inappropriate to compare its commercial prices with its offered price, as there is an enormous difference between commercial procurements and the Postal Service procurement. Finally, MOS contends that, in this case, the Postal Service estimate was not a suitable guideline for determining the reasonableness of an offeror's price.

MOS agrees that the contracting officer did not hold improper discussions and alleges that Monarch's reliance on ABT is unfounded, stating that the contracting officer did not request, nor was he provided, information essential for determining the acceptability of its proposal. In ABT, the contracting officer asked the offeror to "clarify" changes it had made in its technical proposal. Here, MOS merely verified its price.<sup>1/</sup>

<sup>18/</sup> The provision reads as follows:

f. **Award Without Discussions.**

\* \* \* \*

5. This procedure may be used to resolve mistakes without discussions:

(a) The contracting officer informs the offeror of the suspected mistake, identifying the mistake and requesting verification. The contracting officer points out the circumstances giving rise to the suspicion of a mistake (such as . . . significant differences of the offeror's price from the Postal Service estimate or with other prices proposed) without disclosing other offers or the Postal Service estimate. If a mistake is alleged, the offeror may withdraw its proposal or seek its correction.

(b) If the offeror verifies its proposal, the proposal is evaluated as submitted.

\* \* \* \*

(d) Verification [or] withdrawal . . . under this procedure does not constitute discussion. Mistakes may also be resolved through discussions . . . .

<sup>19/</sup> MOS relies on Automated Data Management, P.S. Protest No. 89-71, November 9, 1989. Monarch confirms that it makes no allegations of fraud or bad faith, but bases its protest on the contention that the contracting officer's determination is clearly unreasonable.

<sup>20/</sup> In addition to Automated Data Management *supra*, MOS relies on the following cases: Amigo Supply Co., P.S. Protest No. 89-80, November 9, 1989 and Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984.

<sup>21/</sup> MOS relies on Klein-Sieb Advertising & Public Relations Inc., Comp. Gen. Dec. B-194553.2, 81-1 CPD & 214, March 23, 1981.



In rebuttal comments, Monarch interprets the contracting officer's admission that there were significant differences between MOS' price, the other offered prices, and the Postal Service estimate as evidence that the contracting officer should have performed a more detailed price analysis. Additionally, Monarch alleges that the other vendors were more experienced in the thermal printer field than MOS and this should have cast further doubt on the validity of MOS' price and caused the contracting officer to place greater weight on the competitive prices of the other four vendors. Also, Monarch contends that the Postal Service should have relied upon its extensive experience in purchasing other bar code printing equipment in determining the reasonableness of MOS' price. Finally, Monarch maintains that the Postal Service could at least have compared the bills of materials which each offeror was required to submit with its proposal. Monarch concludes that had the contracting officer used any of these methods he would have found MOS' price to be patently unreasonable.

In its post protest conference comments, Monarch contends that it has disassembled MOS' commercial thermal printer, created a bill of materials, and concluded that MOS' cost for producing the PVI, exclusive of assembly, labor, overhead and profit, must exceed its offered price. Monarch alleges that, instead of giving further scrutiny to MOS' price, the contracting officer requested a waiver, showing that the contracting officer's pricing determination was not the sound exercise of business judgment and was clearly unreasonable.<sup>1/</sup>

MOS replies that the purpose of conducting price analysis is to prevent the Postal Service from paying exorbitantly high prices and, thus, is intended to protect the Postal Service, not contractors. MOS contends that Monarch distorts this purpose.<sup>1/</sup> MOS asserts that, having asked it to verify its price, the contracting officer did not act unreasonably in discounting the difference between MOS' offered price and the Postal Service estimate. MOS contends that the Postal Service estimate was extrapolated, using learning curve analysis, from the cost of a PVI-like component (priced at \$2000.00) of a much larger system from an earlier development contract. The production specification for the PVI was issued more than three years later. MOS contends that the contracting officer could easily have halved the estimate, based on this analysis.

In his final response, the contracting officer states that MOS' price proposal itemized the cost elements in support of its price. He states that the elements included material, labor, overhead, general and administrative costs, as well as profit. He notes that the cost elements fully support MOS' price and are significantly less than the cost figures estimated by Monarch. The contracting officer also notes that MOS, having been alerted to the possibility that it may have made a mistake, had the opportunity to

<sup>22/</sup> Monarch claims that notwithstanding the Postal Service's right to purchase products from a contractor who offers a below-cost price, the potential loss to MOS is so great as to bring into question MOS' responsibility.

<sup>23/</sup> MOS also contends that Monarch's cost analysis is flawed in that it uses undefined "standard costs" for items "similar" to Monarch parts or estimates of non-similar parts. MOS views the analysis as a subjective decision by a biased Monarch employee. Finally, MOS contends that Monarch's conclusions are completely incorrect because they are based on MOS' commercial unit, which is not the unit offered.

withdraw its proposal. The contracting officer concludes that MOS, by confirming its price, assumed all responsibility for profit and loss under the contract.

### Prequalification

Monarch contends that the Postal Service, having made material changes in the PVI specifications after the prequalification testing, should have re-tested the prequalified units to ascertain whether they met the new specifications. Monarch characterizes the label format changes as "key functional requirements." Monarch alleges that option 1, printing serially, is more difficult than parallel printing, and that to print in that manner MOS' PVI requires a software change and a more robust power supply.<sup>1/</sup> Monarch alleges, without identifying any limitation in the solicitation to this effect, that the changes MOS would have to make to its unit would constitute impermissible post-award material changes to MOS' prequalified unit. Monarch asserts that the Postal Service should have re-tested all the prequalified units or should have reviewed data on the vendors' commercial thermal printers to determine whether they could meet the new requirements.<sup>1/</sup>

Monarch contends that by accepting an untested unit, the Postal Service is giving MOS a "second bite at the apple," and concludes that it is improper for the Postal Service to accept a MOS unit different from the one tested in the development contracts.<sup>1/</sup>

In its rebuttal comments, MOS contends that Monarch mischaracterizes the prequalification phase of the procurement as prequalifying the product rather than the manufacturer. MOS points to the solicitation's cover page as stating that the procure-

<sup>24/</sup> Monarch alleges further that, to its knowledge and belief, MOS does not have an installed base of thermal printers capable of printing in the serial mode.

<sup>25/</sup> Acknowledging that the PM does not address this issue, Monarch cites Federal Acquisition Regulation ("FAR") 9.204 for the proposition that contracting officers should re-examine a qualified product or manufacturer when the manufacturer has modified its product to such an extent that its previous qualification is questionable. The section quoted by Monarch states:

#### **Responsibilities for establishment of a qualification requirement.**

The responsibilities of agency activities that establish qualification requirements include the following:

\* \* \*

(i) Reexamining a qualified product or manufacturer when - -

(1) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualifications is questionable . . . .

<sup>26/</sup> Monarch contends that in contrast to MOS, it already has thermal printers with the capability of printing in the serial mode, using existing software and hardware, and would not have to develop new capabilities or modify the structure of its prequalified unit. (Monarch does not state, however, that its prequalified unit printed in the serial mode. It alleges that "[a] Monarch unit that can print bar codes serially, and which has the required label capacity, looks, functions, performs, and is structurally the same as Monarch's prototype PVI that was prequalified. The only difference is the use of existing software and minor cosmetic changes. . . .")

ment was limited to firms that have developed and tested the PVI.<sup>17</sup> Citing PM 2.2.2 b.2.(b), MOS also contends that there would be no requirement for a first article test if the product were prequalified.<sup>17</sup> MOS points out that Monarch has long been aware that the prequalification phase was to determine eligible offerors, not products. In any event, MOS concludes that even if the Postal Service had prequalified the PVIs, Monarch has not shown that the contracting officer's decision to accept MOS' offer was arbitrary or capricious.<sup>17</sup>

Citing PM 4.5.4 b., MOS suggests that Monarch's post-award complaint that the change in the technical specifications warranted further prequalification testing is untimely, as an alleged deficiency in the solicitation that should have been apparent before the date set for the receipt of proposals.

The contracting officer agrees with MOS that Monarch's complaint on this point is untimely. He notes that the July 27 letter notified vendors that a revised specification would be issued prior to the field test. The contracting officer states that the Postal Service never intended that the PVIs proposed for the production procurement would be identical to the prequalified units, as evidenced by the fact that the specifications contained in Solicitation -0103 were changed in many respects from those in the development contracts.

Monarch disagrees that the prequalification phase of the procurement was for the purpose of prequalifying vendors and not products. It interprets the language in Section M.2 of the solicitation to mean that only the previously tested units are "to be delivered." It also points to the three year process for developing and testing the PVI prototype units, which focused primarily on technical issues. Monarch contends that all the milestones during the prequalification process referred to the product, not to vendor capability, and that all participants understood that the units tested would be the units offered for the production quantity procurement.

Apparently arguing in the alternative to its earlier contention that material changes were made to the specifications after completion of its prequalification tests, Monarch's later comments assert that none of the technical changes in the Postal Service's specifications required vendors to propose PVIs materially different from the ones

<sup>27/</sup> MOS also notes that in the July 27 letter regarding the plans for field testing, the contracting officer similarly stated that the production quantity solicitation would be "limited to companies, like your own, who have previously been awarded contracts for engineering models of PVI [sic] through a competitive solicitation, and have delivered units which have successfully passed the laboratory tests." Further, MOS alleges that Monarch was aware prior to the production solicitation that the specifications would change and that its own PVI would have to be modified to meet those specifications and to correct deficiencies.

<sup>28/</sup> PM 2.2.2 b.2.(b) states that "[e]xcept in unusual purchases, first article approval should not be required in contracts for . . . [p]roducts prequalified before award."

<sup>29/</sup> MOS relies on Galbraith-Pilot Marine Corp., Comp. Gen. Dec. B-185955, B-186168, 76-2 CPD & 488, December 15, 1976 for the proposition that retesting of a prequalified product not necessary if a determination is made that the product is still qualified. Further, MOS claims that Monarch has neither demonstrated why FAR 9.204 should apply to the Postal Service nor how the change in the PVI specification rendered the previous qualification questionable.

tested. Therefore, it concludes, the only reason for MOS to propose a PVI different from the unit tested was to offer a lesser product at a price substantially lower than that at which MOS could have offered its prequalified unit. It concludes that by accepting a PVI for which there is no test data regarding its reliability, the Postal Service risks encountering delays should MOS' PVI fail first article tests. Returning to its initial contentions, Monarch maintains that even if the prequalification were of vendors, not of units, MOS would have had to make such major modifications to its prototype unit to meet the revised specification that the Postal Service could not have determined that MOS was a prequalified vendor without testing the modified unit.

MOS reiterates that the solicitation clearly limited participation to companies that had previously been awarded development contracts and maintains that it would be ludicrous for the Postal Service to purchase engineering models or prototypes in production quantities.

### Responsibility Determination

Next, Monarch challenges the contracting officer's affirmative determination that MOS is a responsible offeror. Monarch asserts that MOS is a small company with no experience in manufacturing PVIs and little experience in assembling them. Thus, Monarch alleges that MOS does not have the required "organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls." PM 3.3.1 5. Monarch contends that it is familiar with MOS' current capabilities and experience in producing shipping manifest systems and concludes that the contracting officer could not have concluded that MOS' management proposal reflected adequate personnel or experience to perform. It contends that MOS has a small work force of only sixty people and will be required to hire and train a significant number of employees to produce PVIs in a timely manner. Monarch also contends that MOS lacks the financial capability to make necessary expansions in space, inventory, equipment, and employees, to produce the PVIs.

Monarch alleges, on information and belief, that MOS cannot meet any of the responsibility standards listed in the PM and that the contracting officer either made no responsibility determination or had no evidence upon which to base such a determination. It concludes that the contracting officer's decision to award, based on price alone, without making a responsibility determination potentially will lead to default or other unsatisfactory performance.<sup>1/</sup>

Finally, Monarch alleges that MOS does not qualify as a manufacturer of PVIs under the Walsh-Healey Act, 41 U.S.C. " 35-45, contending that MOS merely purchases parts and components and assembles the units. Monarch asserts that assembling functions do not qualify MOS as a manufacturer under the Walsh-Healey Act and sets forth several arguments in support of its position.<sup>1/</sup>

<sup>30/</sup> Monarch cites PM 3.3.1 a. & b. and Express By B&M, P.S. Protest No. 91-02, February 12, 1991.

<sup>31/</sup> This office has no jurisdiction over Walsh-Healey matters. PM 4.5.1.; see Tulsa Diamond Manufacturing Corp., et al., P.S. Protest Nos. 85-18, 85-20, 85-23, June 20, 1985; Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985. The contracting officer has referred this portion of Monarch's protest to the Department of Labor ("DOL") pursuant to PM 10.2.5 i. 3. On January 6, 1992, while this decision was pending, the DOL determined MOS to be eligible for award of this contract under

In his statement, the contracting officer disagrees with Monarch's assessment of MOS' responsibility. He states that the evaluation committee examined MOS' management proposal and found it to reflect satisfactorily that MOS had the experienced personnel, technical know-how, equipment, and space to perform the contract. The Quality Assurance Division of the Office of Technical Support performed a pre-award survey at MOS' facilities and studied MOS' technical capability, production capability, plant facilities and equipment, purchasing and subcontracting, quality assurance, transportation, plant safety labor resources, performance record, ability to meet the schedule, installation and environmental issues. The survey team recommended that MOS be determined responsible. Similarly, the Contract Pricing Division of the Office of Procurement performed an analysis of MOS' financial statement and concluded that MOS has the necessary financial resources.

In its comments, MOS claims that Monarch has neither shown that the contracting officer's responsibility determination was fraudulent or made in bad faith, nor claimed that definitive responsibility criteria were not met. Thus, MOS asserts that Monarch has not met the legal standard to overturn the contracting officer's responsibility determination.<sup>32/</sup>

In its comments filed subsequent to its protest conference, Monarch asserts that MOS will sustain a loss of \$5.8 million on the performance of this contract, an amount almost equal to its annual revenue. Monarch submits an affidavit of its Vice President of Finance, alleging that based on Dun & Bradstreet and TRW reports, MOS cannot withstand a loss of that magnitude. Monarch asserts that the contracting officer could not have reasonably found MOS to have the financial ability to perform.<sup>33/</sup>

In response, MOS maintains that there is no factual basis for Monarch's contentions, asserting that the assumption that MOS will lose almost \$6 million on this contract is erroneous. It maintains that it is an established supplier to the Postal Service, that it was the original developer and manufacturer of the IRT, of which the PVI will be a part, and that its current financial data shows that it is responsible, as does the pre-award survey.

### Discussion

the Walsh-Healey Act.

<sup>32/</sup> MOS cites J. T. Construction Co., Inc., P.S. Protest No. 90-59, February 22, 1991 and related cases.

<sup>33/</sup> Monarch also claims that the contracting officer made his responsibility determination on July 8, prior to the price analysis of MOS' proposal and that it is, therefore, invalid. Monarch bases this conclusion on the fact that, in responding to Monarch's request for documents under the Freedom of Information Act ("FOIA"), the FOIA officer indicated that the responsibility determination document was dated July 8. The memorandum to the file regarding the responsibility determination is dated July 16. The file also contains a document, dated July 8, from the Contract Pricing Division regarding its review of MOS' financial statements. That document indicates that the contracting officer had not made a responsibility determination at that time. We conclude that the FOIA officer's reference to the responsibility determination as dated July 8 was in error.

### Technical Specifications

Monarch complains that MOS cannot provide a PVI that meets certain of the solicitation's technical requirements. Although couched in terms of a challenge to the award, the matter is actually one of contract administration. "[T]he level of performance required of a contractor during contract performance is a matter of contract administration and is not properly before our office in a protest proceeding."

Transnorm System Inc., P.S. Protest 90-58, October 26, 1990; Nelson Window and Glass Company, P.S. Protest No. 86-44, July 25, 1986. The technical specifications which Monarch asserts MOS cannot fulfill are performance requirements with which MOS has offered to comply. We have reviewed MOS' proposal. That review indicates that MOS responded fully to the solicitation, and did not merely restate verbatim the solicitation requirements.<sup>34/</sup> See H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. MOS' technical proposal was fully sufficient. C.f. Apec Technology Limited, P.S. Protest No. 88-23, June 30, 1988; Carini's, Inc., P.S. Protest No. 83-65, December 13, 1983.

The Postal Service's acceptance of MOS' offer obligates MOS to supply a PVI in accordance with the solicitation requirements. Whether MOS actually fulfills its obligation is a matter of contract administration. Given the tests performed on MOS' prototype PVI, the contracting officer could reasonably conclude that MOS was capable of supplying a conforming PVI.

### Technical Acceptability

Monarch contends that the contracting officer failed to make a determination that MOS' offer was technically acceptable. As a general rule, "[t]his office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990. "In reviewing a technical evaluation, we will not evaluate the proposal de novo, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. . . . The protester bears the burden of showing that the technical evaluation was unreasonable." Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986 (citations omitted).

We have discovered no factual basis for Monarch's contention. The contracting officer has demonstrated that an evaluation committee evaluated the technical and management proposals of all offerors. Each offeror was requested to respond to technical issues in the form of written discussions. The evaluation committee report states that "[b]ased upon the initial submission and responses to questions, the evaluation committee has found all of the proposals submitted as acceptable." The evaluation committee's recommendation was not arbitrary or in violation of procurement regulations and is reasonably supported by the record. York International Corporation, supra. Monarch has failed to show either that the contracting officer failed to make a

<sup>34/</sup> For example, MOS' technical proposal specifically addresses Monarch's technical concerns with respect to the size of the label roll core, stating that its choice of core size is designed to minimize label curl.

technical acceptability determination or that the evaluation should be overturned. The fact that Monarch disagrees with the contracting officer's determination that MOS' proposal was technically acceptable does not render the determination unreasonable. General Exhibits, Inc., P.S. Protest No. 85-77, December 5, 1985.<sup>1/</sup>

### Evaluation of Proposals

Monarch alleges several flaws in the evaluation process. Our regulations state that "[p]roposals must be evaluated in accordance with . . . the evaluation criteria specified in the solicitation." PM 4.1.4 a. Here, the solicitation was limited to those offerors that had tested engineering models of the PVI under earlier developmental contracts. The solicitation stated that the five previously tested PVIs were found to be technically equivalent, and that technically acceptable offers would be evaluated for award only on the basis of price. Where no other evaluation factors are listed, award based on price alone is not improper. Bell & Howell Federal Government Sales, P.S. Protest No. 91-24, April 15, 1991. Since price was the sole evaluation factor and the lowest priced offeror was awarded the contract, the evaluation was correct.

Monarch is troubled by MOS' "unreasonably low price," concluding that the contracting officer failed to conduct adequate price analysis. Our regulations state that "[w]henver adequate price competition has been obtained, comparison of proposed prices and Postal Service estimates will ordinarily suffice to meet price analysis requirements." PM 5.3.3 b.3. Price competition exists if "[t]wo or more independent and responsible offerors submit price proposals meeting the solicitation's requirements . . . and [t]he solicitation identifies price as a significant evaluation factor for contract award." The contracting officer determined that there was adequate competition upon which to base his price analysis because all five vendors responded to the solicitation.<sup>1/</sup>

He also determined that MOS' price was fair and reasonable. A contracting officer's determination of price reasonableness is an exercise of business judgment. A.B. Dick Company, Comp. Gen. Dec. B-233142, 89-1 CPD & 106, January 31, 1989 (determination of price reasonableness upheld where award price was lower than the government estimate and the prices of the other competitors.)<sup>1/</sup> Our standard for review of determinations of price reasonableness is similar to that of responsibility determinations. They will not be overturned unless clearly unreasonable or there is a showing of bad faith or fraud. Automated Data Management, Inc., *supra*, quoting Alan Scott Industries; Grieshaber Manufacturing Company, Inc., 63 Comp. Gen. 612, 613 (1984).

<sup>35/</sup> Monarch's reliance on Handling Systems, Inc., is unavailing. There, unlike here, there was no documented evidence of any technical evaluation having been conducted.

<sup>36/</sup> Where several offerors submit firm fixed price proposals under a solicitation providing that award will be made to the low priced technically acceptable offeror, adequate price competition is obtained and the government is not obligated to perform a cost analysis. Contract Services, Inc., Comp. Gen. Dec. B-232689, 89-1 CPD & 54, January 23, 1989.

<sup>37/</sup> Ordinarily, determinations that prices are not fair and reasonable apply to situations where the price is too high. See, Automated Data Management, Inc., *supra*; *c.f.*, SMC Information Systems, Comp. Gen. Dec. B-224466, 86-2 CPD & 505, October 31, 1986 (applicability of FAR ' 14.404-2(f) (1985) authorizing rejection of an individual bid that is "unreasonable as to price" refers to unreasonably high prices, not unreasonably low ones.)

The contracting officer states that he thoroughly examined MOS' entire proposal before concluding that MOS' price was reasonable. He also verified that MOS had not made a mistake in its offer. Finally, the contracting officer examined the cost elements of MOS' proposal and concluded that they fully support MOS' proposed price and do not reflect that MOS' proposal is below cost.<sup>1/</sup> Monarch does not allege bad faith or fraud, nor do we find any evidence to support such an allegation. The contracting officer adequately considered MOS' proposed price, including its lowness, and his determination that MOS' price was fair and reasonable was not clearly unreasonable.

Next, Monarch alleges that the contracting officer held improper discussions with only the awardee when he asked MOS to verify its price. Our regulations obligate the contracting officer, upon receipt of proposals, to examine them for mistakes and they clearly state that communication with an offeror concerning mistakes is clarification, not discussion, unless correction of the mistake requires reference to data outside the solicitation.<sup>1/</sup> PM 4.1.3 f. Where award is made with discussions, PM 4.1.5 g.3.(a)(3) provides that discussions must be held to "[r]esolve any suspected mistakes . . . ." After BAFOs, any remaining uncertainties "must be clarified or corrected through negotiations . . . ." PM 4.1.5 g.5.(b).

The better course of action would have been for the contracting officer to reopen discussions in order to resolve his uncertainties about MOS' price. However, it is clear that the contracting officer viewed the issue as one which could be resolved through clarification. Price was the only evaluation factor upon which award was based, even though discussions were held with each offeror to determine whether their proposals were technically acceptable. Having determined that MOS was the low acceptable offeror, the contracting officer could verify MOS' price without discussions.<sup>1/</sup> In any event, we are unable to conclude that the other offerors were prejudiced by the contracting officer's actions, since MOS did not change any part of its BAFO as a result of the contracting officer's inquiry. See Klein-Sieb Advertising & Public Relations, Inc., *supra*.

### Prequalification

Monarch contends that the evaluation of the proposals was flawed because it was not

<sup>38/</sup> As MOS has noted, however, award of a contract to an otherwise responsible offeror is not precluded on the basis that the awardee's price is below cost. Lightron of Cornwall, Inc., *supra*. MOS' ability to perform is a matter of responsibility, discussed *infra*.

<sup>39/</sup> The procedures at PM 4.1.5 f.5 for resolving a mistake, which the contracting officer contends are applicable, see fn. 18, *supra*, apply only to situations where award is made without discussions. Here, written discussions were conducted, making the 4.1.5 f.5. procedure unavailable.

<sup>40/</sup> This conclusion is not inconsistent with the view stated by the Comptroller General in ABT Associates, Inc., *supra*, cited by Monarch. In that case, an offeror reduced its proposed level of effort in its second BAFO and the contracting officer subsequently contacted the offeror twice to seek additional information and explanations for its actions. The Comptroller General found that the acceptability of the offeror's proposal was dependent on its satisfactory responses to the contracting officer's concerns and the contracting officer's contacts with the offeror, therefore, constituted discussions. In this case, the contracting officer did not seek additional information from MOS, only a price verification.



based on the exact prototypes that had been previously tested. This issue is untimely raised. "Protests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." See also Larse Corporation, P.S. Protest No. 90-48, October 18, 1990. All of the offerors participated in the prior procurement for engineering models of the PVI. All were aware that the field tests were cancelled and that the technical specifications changed prior to the issuance of the instant solicitation. Presumably, all offerors, including Monarch, had to review the characteristics of the previously tested units to determine if they needed modification to meet the new requirements of the production solicitation. Accordingly, the basis for any allegation that further testing should have been performed in the evaluation of offers under this solicitation was apparent before the date and time set for the receipt of proposals.<sup>41/</sup> It follows that post-award allegations that no offeror could offer a PVI different from its previously tested engineering model are also untimely. This office lacks jurisdiction over untimely protests. American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988. This portion of Monarch's protest is dismissed as untimely.

#### The Responsibility Determination

Finally, Monarch claims that MOS is not a responsible offeror, lacking the required organization, experience, technical skills and financial ability to perform. It is well established that "[a]n affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria." Gage Constructors, P.S. Protest No. 87-11, July 13, 1987; Georgia Power Company, P.S. Protest No. 90-01, February 14, 1990. Monarch does not allege fraud, and the solicitation does not identify any definitive responsibility criteria. The contracting officer states that his responsibility determination was made only after a thorough review of MOS' management proposal, financial statements, past performance on other postal contracts, and the completion of a pre-award survey. Based on its perception of MOS' capabilities, Monarch strongly disagrees with the contracting officer's determination, but this is insufficient to show abuse of discretion. Alabama Metal Products, Inc., P.S. Protest No. 91-20, May 7, 1991 (dismissed on other grounds); Pitney-Bowes, Inc., P.S. Protest No. 87-95, November 20, 1987. The record supplies no basis to overturn the contracting officer's determination.

The protest is dismissed in part and denied in part.

**[Signed]**

<sup>41/</sup> Monarch alleges that the language in Section M.2 that the "PVI models previously tested [are] to be delivered here" further indicates that the offered units had to be the same as the prototypes. This appears to be an allegation of an ambiguity in the solicitation which was apparent before the date set for receipt of proposals. Thus, it is similarly untimely. Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989.

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**[Compared to original 5/17/95 WJJ]**